IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2378 OF 2004

Union of India, through)
General Manager, Central Railway)
Mumbai CST, Mumbai-400 001.)..PETITIONER

Versus

1.Madho Singh Samant,)
c/o.Madhya Railway Karmachari)
Sangh, 33, Moti Bhavan, Dr.)
D'Silva Road,Dadar,Mumbai-400028)
2.Presiding Officer, Central)
Government Industrial Tribunal)
No.2, Mumbai-400 022.)..RESPONDENTS

Mr. Suresh Kumar with Ms. D'Lila & Ms. Suchita Kzamble for the Petitioner

Mr. J.K. Mistry with Mr. v.V. Khemka, for the Respondents

CORAM: F.I. REBELLO, J.
DATE : 11th October,2004

ORAL JUDGMENT:

1. Rule. Heard forthwith. The petitioner aggrieved by the Award of the Central Government Industrial Tribunal No.II, dated 3th June, 2003 has preferred the present petition.

2. A few facts may be set out. The respondent No.1 was initially appointed on 19th January, 1996. His services came to be terminated by notice dated 31st March, 1997. The notice reads as under:-

> The services of Shri Madhe Singh Samant, Substitute Bungalow Peon to SDGM, in scale Rs.750-940 (RPS) are terminated with immediate effect. A cheque for Rs.3,319/-(Three Thousand Three Hundred and Nineteen), is enclosed herewith being payment towards retrenchment compensation and one

month's wages in lieu of notice period as detailed below: This has the approval of the competent authority.

The contention of the respondent-workman was that his services were illegally terminated. Pursuant to that a reference came to be made to the Industrial Tribunal. The subject matter of the of the reference was whether the services of the respondent No.1 were legally terminated; whether the action of the General Manager in terminating the services of the respondent-workman with effect from 31st March, 1997 is justified. The Tribunal after framing issues was pleased to hold that considering the evidence on record the petitioner management had terminated the services of the respondent workman as he had remained absent without any intimation and his work was not satisfactory. The Tribunal also noted that there was a clear admission that no notice or charge sheet was given to the workman. The learned Tribunal, held that no show cause notice nor charge-sheet nor hearing nor even order of termination was given to the workman which is clear cut departure from the mandatory provisions of Section 25F of the I.D. Act and held that the termination s wholly unjustified and directed reinstatement with full back wages and consequential benefits. It is this Award which is the subject matter of the present petition.

3. At the hearing of this petition on behalf of

the petitioners their learned Counsel contends that the services of the respondent were terminated considering the Rules applicable to such appointment. There was no stigma attached to the order of termination. The petitioner had paid retrenchment compensation in terms of Section 25F of the I.D. Act. In these circumstances it is pointed out that it cannot be said that the order was without jurisdiction.

. It is then submitted that considering the Rules the finding recorded by the Tribunal that the show cause notice had to be given and/or for that matter charge sheet ought to have been served would not arise as the respondent was not dismissed for any misconduct. Reliance is placed on various judgments which will be considered in the course of the judgment.

. On the other hand on behalf of the respondent his learned Counsel contends that in the instant case the petitioners themselves had brought on record that the services of the respondent were terminated on the ground of absentism. This would amount to misconduct and, therefore, the services could not have been terminated without conducting an enquiry. As rightly held by the Tribunal no notice or charge sheet was issued to the petitioner and on this count itself the order is liable to be set aside.

. It is then submitted that considering the material on record the order of termination amounts to a stigma and considering that the services could not have been terminated without holding an enquiry. It is lastly submitted that if it is the contention of the petitioners that the services of the respondent were terminated then the petitioners have not complied with the principles of first come last go and on that count also the order ought not to be interfered with.

4. The facts are not in dispute. The respondent workman was appointed as a substitute Bungalow peon in terms of the administrative instructions dated October, 9, 1972 read with instructions dated 11th June, 1996. The relevant clause reads as under:-

> "vii) The service of a substitute Bungalow, Peons, who has not rendered 3 years service and who is not in turn for appointment to any other class IV post on the basis of his selection for appointment to such post, may be terminated without assigning any reason, either on the transfer of the officers (to whom he is attached) or earlier after giving him requisite notice or paying retrenchment compensation due and admissible under the rules.
>
> x) After completion of 3 years continuous

> services as a Bungalow Peons will be deemed to have acquired regular status as a Railway servant from the date of following that on which he completes 3 years service and assigned seniority position in any vacant Class IV post with effect from that date."

These instructions were partly being modified by instructions dated 11th June, 1996 of which clause 5 reads as under:-

> 5. The service of a Substitute Bungalow Peon who has not rendered 3 years service and who is not in turn for appointment to any other Class IV post on the basis of his selection for appointment to such post, may be terminated without assigning any reason, either on the transfer of the Officer to who he is attached or earlier, after giving requisite notice and paying retrenchment compensation due and admissible under the extent Rules."

In the written statement filed by the petitioners they denied that the respondent had applied for leave from 12th March, 1997 to 12th April, 1997. No papers were submitted through SDGM. On previous occasions too, the performance of Shri Samant was not found to be satisfactory by SDGM and hence as per the order of SDGM, the services of the respondent came to be

terminated. It was also pleaded that the respondent was absent from 12th March, 1997 to 12th April, 1997. A plea was also raised that the termination falls under exception of Section 2(oo)(bb) of the I.D. Act. On behalf of the petitioners evidence was led on affidavit by way of examination in chief by D.V. Deoghare, Assistant Personal Officer (Admn.). He has set out therein that the respondent was absent from 12th March, 1997 to 12th April, 1997. The respondent was absent unauthorisedly during that period without taking prior permission from STGM. The services were terminated pursuant to the instructions as contained in Railway letter dated 9th October, 1972 and letter dated 11th June, 1996. They have complied with the requirement of Section 25F by giving one month's notice and paid salary in lieu of one month's wages. In his cross examination he denied that the respondent has applied for leave. It is also admitted that before termination no show cause notice was given.

5. From the above pleadings and evidence the issues that now arise must be considered. It may be pointed out at the outset that neither Rules of 1972 or 1996 and the powers to terminate by giving one months notice were challenged either before the Tribunal or before this Court. The question, therefore, is whether the Award of the Tribunal can be upheld. Without first considering whether the termination is according to the Rules, let us examine

whether the termination is on account of misconduct and/or the order of termination casts a stigma. The order of termination is itself innocuous. It does not speak of the reasons for termination. It is only in the written statement as also in the evidence that the petitioners have set out that the services of the respondent came to be terminated because of unsatisfactory performance. The appointment of the respondent was not as a probationer. The appointment was in terms of Railway instructions contained in the instructions of 1972 and 1996. The appointment could be for a maximum period of 3 years initially. In the course of 3 years if the workman is selected for a class IV post then he will be so appointed. On completion of 3 years he will be deemed to have acquired regular status. The issue, therefore, is the power of the petitioner to terminate between the date of appointment and before completion of 3 years as it is during this period that his services came to be terminated. In the case of Kunwar Arun Kumar vs. U.P. Hill Electronics Corporation Ltd. & Ors., (1997) SCC 191 the termination was of a probationer. During the period of probation his services came to be terminated on the ground that his performance was found unsatisfactory. The challenge by the workman employee therein before the High Court was rejected. In Appeal before the Apex Court answering the issue as to whether the termination amounted to a stigma and consequently enquiry had to be held the Apex Court observed as under:-

> "During the period of probation, the authorities are entitled to assess the suitability of the candidates and if it is found that the candidate is not suitable to remain in service they are entitled to record a finding of unsatisfactory performance of the work and duties during the period of probation. Under these circumstances, necessarily the appointing authority has to look into the performance of the work and duties during the period of probation and if they record a finding that during that probation period, the work and performance of the duties were unsatisfactory, they are entitled to terminate the service in terms of the letter of appointment without conducting any enquiry. That does not amount to any stigma. If the record does not support such a conclusion reached by the authorities, a different complexion would arise."

In Mathew P. Thomas Vs. Kerala State Civil Supply Corporation Ltd., and Ors., 203 SCC (L & S) 262, the employee was on probation. His services came to be terminated. The issue was whether the termination was simpliciter or punitive. In that a show cause notice was issued containing serious allegations of misconduct, but order of termination was based on unsatisfactory performance in terms of clause 2 of

the appointment order. While considering the issue the Apex Court was pleased to observe as under:-

> " From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. If the form and language of the so-called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature and/or it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases

there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be simpliciter, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct."

. On the other hand on behalf of the respondent workman learned Counsel has drawn my attention to the judgment of the Apex Court in Dr.Mrs. Sumati P. Shere v. Union of India & Ors., AIR 1989 SC 1431. In that case the appointment was adhoc basis for a period of six months or till the regular candidate from U.P.S.C. become available whichever is earlier. The Appellant before the Apex Court was continued by successive extensions from time to time. However, by letter of 12th January, 1985 she was informed that her services stood terminated. The Tribunal held

that when the authorities were not satisfied with the performance of the appellant and, therefore, her reappointment was not recommended. It is in that context the Apex Court noted that there is a moral obligation in the matter of master and servant to act fairly. The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies, indifference or indiscretion of the employee may be by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, it would be arbitrary to give a movement order to the employee on the ground of unsuitability. The Apex Court then noted that all that the Court wishes to state is that if she is to be discontinued it is proper and necessary that she should be told in advance that her work and performance are not up to the mark. Relying on this judgment it has been submitted that the services could not have been terminated without bringing to the notice of the respondent his deficiency. My attention was also invited to the judgment in the case of Alcobex Metals Ltd. vs. State of Rajasthan & Ors., (2004 (102) FLR 502 to point out that it is open to the Tribunal to go into the real nature of the order.

. In the instant case the rules considering the nature of the appointment provided for termination. The order of termination by itself was innocuous.

The termination no doubt was for unsatisfactory performance, in the instant case absentism from duty without permission. Considering that in my opinion the test applied in Dr. Mrs. Sumati P. Shere (supra) would be clearly distinguishable. An employee who chose to remain absent himself without permission and when there is power in the employer to terminate the services cannot complain that he ought to have been given a notice. In such cases there will be no question of any notice.

6. The order of termination also cannot be said to be punitive, merely because of unsatisfactory performance. As noted by the Apex Court in the case of Kunwar Arun Kumar (supra) the authorities in case of unsatisfactory performance are entitled to terminate the services. That would not cast a stigma.

7. In my opinion, therefore, the order of the tribunal discloses error of law apparent on the face of record and therefore acted without jurisdiction in directing the reinstatement on the ground that no notice or charge sheet was served. The very appointment of the petitioner was in terms of the notification of 1972 and 1996. The termination was in terms of these notifications. He has not been dismissed for misconduct. Consequently the Award on that count is liable to be set aside.

8. We have then the last issue as to whether

there has been non-compliance of the requirement of Section 25F of the I.D. Act. Gainful reference may be made to the judgment in the case of State of Uttar Pradesh & Anr. vs. Kaushal Kishore Shukla, (1991) 1 SCC 691. The Apex Court therein was considering the principles of last come first go. The Apex Court held that this principle will be inapplicable where termination of service of a senior is effected for unsuitability of assessment of work in terms of contract of service and service rules. In the instant case the respondent was terminated on the ground of unsatisfactory performance. The termination was not on the ground that he has become surplus in which case the principle of last come first go would be applicable. Considering the judgment in Dr. Mrs. Sumati P. Shere (supra) it cannot be said that there has been violation of principle of first come last go. The respondent was otherwise paid one months's wages in lieu of notice. Therefore, the termination cannot be faulted on that count.

9. In the light of that the petition will have to be allowed. The impugned award dated 3rd June, 2003 is quashed and set aside. The reference is rejected. There shall be no order as to costs.

Certified copy expedited.

(F.I.REBELLO, J.)